

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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**CASE NO. 17 OF 2004**

**In the matter of**  
**Review of Order dated 16.6.2000, in respect of demand charges levied on M/s. Pudumjee Pulp & Paper Mills Ltd. considering CPP synchronized with the grid, and related issues.**

**Dr. Pramod Deo, Member**  
**Shri. A. Velayutham, Member**

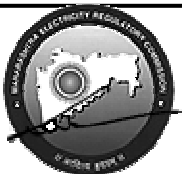
**ORDER**

**Dated: 7<sup>th</sup> February, 2005**

This Petition has been filed on 6<sup>th</sup> September 2004 by M/s. Pudumjee Pulp & Paper Mills Ltd. ("Pudumjee"), Pune against the Maharashtra State Electricity Board (MSEB) as Respondents, with the following prayers:

- "(a) To declare that the coercive steps taken by MSEB in sending supplementary bill dated 16.6.2001 to the sum of Rs.60,52,330/- are illegal and unjustified;*
- (b) To declare that issuance of supplementary bill dated 16.6.2001 for amount of Rs.60,52,330/- by MSEB on the basis of audit report is contrary to the law and amounts to the abuse of process of this Commission;*
- (c) To quash and set aside the supplementary bill dated 16.6.2001 of Rs.60,52,330/- issued by MSEB under the guise of audit report;*
- (d) To grant such other relief as the Commission deems fit and proper including directing MSEB to refund the amount of Rs.60,52,330/- with interest at 18% p.a. "*

2. The Petition states that Pudumjee is a High Tension consumer of MSEB paying around Rs.85 lakhs per month towards electricity charges. In pursuance of Government of Maharashtra's 1993 Industrial Policy encouraging captive power generation, Pudumjee was granted consent by MSEB under letter dated 22<sup>nd</sup> September 1998 for installing a 6.4 MW Captive Power Plant (CPP) to run parallel with the MSEB grid at the supply voltage of 22 KV, under Section 44 of the Electricity (Supply) Act, 1948 with certain terms and conditions. The CPP was commissioned and synchronized with the grid in December 1998. As per MSEB's High Tension Tariff effective from 1<sup>st</sup> September 1998, the Tariff rate mentioned was as under -



*Demand charges Rs.180/- per month per KVA of billing demand*

PLUS

*Energy Charges*

*350 p/u + FCA*

*Fuel Cost Adjustment (FCA) Charges as applicable from time to time.*

*Consumer having captive power plant synchronized with the Board's system shall pay demand charges at the rate of Rs.200/- KVA/month.*

3. The Petition states that from 1998 the rate for billing by MSEB for energy consumed by Pudumjee was Rs.180 on 75% of the contract demand. Pudumjee was never charged the additional component of Rs. 20 considering its CPP in any of the bills sent after December 1998.

4. It is further stated that MSEB submitted their proposal for revision of tariff upon which the Commission passed an Order dated 28<sup>th</sup> April 2000. The Petition contends that there was no reference to the concept of levy of additional demand charges of Rs.20 by the MSEB in their first tariff revision proposal to the Commission, and thus there was no mention of it in the operative Order dated 28<sup>th</sup> April 2000 (and subsequent detailed Order dated 5<sup>th</sup> May 2000) by which the first revision came into force.

5. The Petition states that, pursuant to the tariff Order dated 5<sup>th</sup> May 2000, MSEB filed an Application dated 23<sup>rd</sup> May 2000 requesting the Commission to consider some of the "practical difficulties" faced by MSEB in the implementation and to issue suitable directives/ clarifications on various matters. One such issue was regarding the demand charges for HT consumers who have installed CPPs synchronized with the Board's system.

6. The above issue was dealt with by the Commission in its Order dated 16<sup>th</sup> June 2000, wherein it was clarified that HT consumers who have installed CPPs synchronized with the MSEB system will be billed demand charges at the rate of Rs.320/KVA/month for HTP-I and HTP-II categories (i.e. with an additional component of Rs. 20 over and above the demand charges otherwise applicable), and also that this matter would be taken up for further consideration at the time of taking up issues relating to Section 22(1) of the then prevailing Electricity Regulatory Commissions (ERC) Act, 1998. It is contended in the Petition that there was a violation of principles of natural justice because no notice was issued to Pudumjee (a HT consumer having CPP synchronized with the grid) before the Order dated 16<sup>th</sup> June 2000 clarifying the above issue was passed on MSEB's Application.

7. The Petition states that, following the Order dated 16<sup>th</sup> June 2000, under letter dated 16<sup>th</sup> June 2001, MSEB asked Pudumjee to pay around Rs. 60.52 lakhs against a supplementary bill issued for alleged short billing of the demand charges from December 1998 to May 2001. This composite bill of Rs.60.52 lakhs can be divided into two parts, i.e. for the period from December 1998 to April 2000, prior to the Commission's Tariff Order, and for the period subsequent to the Order, i.e. May 2000 to May, 2001. Since the first period was prior to the Commission's Order dated 5<sup>th</sup> May 2000, for the supplementary bill for that period Pudumjee filed a Writ Petition before the Bombay High Court (No.2567/02). However, it was dismissed in limine by the High Court vide its Order dated 9<sup>th</sup> June 2003.



8. It was stated by MSEB that Pudumjee had been billed at Rs.180 and Rs.300 per KVA (pre and post revision) respectively instead of Rs.200 and Rs.320 per KVA, i.e. without the additional Rs. 20 component. According to the Petition, from subsequent correspondence it transpired that this additional demand was made by MSEB on the basis of the Commission's Order fixing Rs.20 as additional demand charge from consumers having a CPP synchronized with the grid, which was over and above the basic charge of Rs. 300 per KVA. Pudumjee also learnt from the correspondence that, by its Order dated 16<sup>th</sup> June 2000, the Commission allowed MSEB to charge Rs.20 as additional demand charge, and the supplementary bill was raised with retrospective effect from December 1998 onwards on that basis.

9. It is further contended that, from December 1998 onwards, Pudumjee was billed at the rate of Rs. 180/month, and from May 2000 at the rate of Rs. 300/month, both without including the additional component of Rs.20. Thus, there was a deliberate incorrect statement of fact made by MSEB in their Application dated 23<sup>rd</sup> May 2000 with respect to Pudumjee while seeking clarification from the Commission. It is therefore submitted that the Commission may, in exercise of its powers under Regulations 85 and 92, review its Order of 16<sup>th</sup> June 2000 because, had the Commission been made aware of the correct and full facts, that Order would not have been passed.

10. Pudumjee has pointed out that, in addition to the Writ Petition filed in the Bombay High Court, it also filed a Review Petition (Case No.30 of 2001) before the Commission with respect to Orders dated 29<sup>th</sup> December 2001 and 10<sup>th</sup> January 2002 in Case No.1/2000 r/w Order dated 5<sup>th</sup> May 2000 as modified by Order dated 16<sup>th</sup> June 2000 in Case No.1/1999. The Review Petition was disposed of by the Commission vide its Order dated 22<sup>nd</sup> July 2004, but liberty was granted to Pudumjee to reapply with further grounds for admission in terms of the Regulations governing review in case it was able to do so subsequently, keeping in view the position recorded at paras 31 & 32 of the Order. Pudumjee has accordingly filed the present Petition.

11. No reply was received from MSEB upto the date of the admissibility hearing, which was held on 18<sup>th</sup> October 2004, and at which Shri. Ramesh Darda, Counsel for Pudumjee briefly reiterated the sequence of events and correspondence set out in the Petition. Shri. Darda referred to the tariff determined for MSEB's HTP-1 consumers in the Commission's operative Order dated 28<sup>th</sup> April 2000, which was followed by the detailed tariff Order dated 5<sup>th</sup> May 2000 in Case No.1 of 1999. He then referred to MSEB's Application dated 23<sup>rd</sup> May 2000 "Annexure 4-A, Page 64 of the Petition) whereby MSEB requested the Commission to consider some of the "practical difficulties" faced in implementation of the Tariff Order dated 5<sup>th</sup> May 2000 and to issue suitable directives/clarifications on various matters.

12. Citing one of these issues, Counsel for Pudumjee referred to the following prayer / request made by MSEB in its Application to the Commission (Page 69) -

***"Demand Charges for Captive Power Producers:-***

*The High Tension consumers who have installed Captive Generation plants and wherever these plants were synchronized with the Board system were billed demand charges at the rate of Rs.200/KVA/month (Rs.20 higher than HTP-I demand charge) instead of the demand charges is prevailing under HTP-I and HTP-II category. It is proposed to follow the same principles and consumers shall now be charged demand charges at the rate of Rs.320/KVA/month."*



Counsel for Pudumjee stated that this issue was dealt with at Para 7 (page 73) of the Commission's Order dated 16<sup>th</sup> June 2000 as follows:

***"Demand Charges for Captive Power Producers:-***

*The Commission clarifies that the high-tension consumers who have installed captive generation plants and wherever these plants are synchronized with the Board system will be billed demand charges at the rate of Rs.320/KVA/month for HTP-I and HTP-II categories. However, this matter will be taken up for further consideration at the time of taking up issues relating to Section 22(1) of the ERC Act 1998. "*

With reference to the last sentence above, Counsel for Pudumjee stated that the matter of standby charges for CPPs was finally settled by the Commission much later, in its 3<sup>rd</sup> Tariff Order dated 10<sup>th</sup> March 2004. He contended that there was no reference to the concept of additional demand charges of Rs.20 by the MSEB in their first tariff revision proposal, and thus there was no mention of it in the Commission's Orders dated 28<sup>th</sup> April 2000 and 5<sup>th</sup> May 2000 by which the first revision came into force.

13. Counsel further submitted that Pudumjee was actually billed at the rate of Rs.180 per month, and never at the rate of Rs.200/KVA/month. He contended that there had been a violation of principles of natural justice because no notice was issued to Pudumjee before the Order dated 16<sup>th</sup> June 2000 clarifying the position was passed on MSEB's Application. Hence, Pudumjee was not given an opportunity to set out the real position before the Commission, which was that MSEB's Application dated 23<sup>rd</sup> May 2000 did not give a true disclosure of the facts as regards Pudumjee, viz. that there was another category of synchronized CPPs (including Pudumjee) to whom demand charges of Rs.180/- rather than Rs. 200/KVA/month were applicable and that, thus, the 16<sup>th</sup> June 2000 Order was passed by the Commission without that knowledge. The Order could not, therefore, be treated as binding upon Pudumjee. Pudumjee Counsel submitted that there were several Supreme Court and High Court rulings to the effect that an Order which was based on misrepresentation was not binding insofar as it related to any particular party.

14. Counsel for Pudumjee submitted that, following the Order dated 16<sup>th</sup> June 2000, MSEB sent a letter dated 16<sup>th</sup> June 2001 (Annexure-9, page 119) to Pudumjee alongwith a supplementary bill amounting to Rs.60,52,330/- for the period from December 1998 to May 2001 referring to the HT tariffs effective from 1.9.1998 and 1.5.2000 (the latter being the tariff for synchronized CPPs as clarified by the Order dated 16.6.2000 in which Pudumjee was not noticed). He argued that, in case there had been a shortfall in the levy, MSEB could have followed the appropriate course for remedy.

15. Counsel for Pudumjee submitted that this composite bill of Rs.60,52,330/- can be divided into two parts, i.e. for the period December 1998 to April 2000 prior to the Commission's Tariff Order (for which the amount comes to Rs.37,40,646/-), and for the period subsequent to the Order, i.e. May 2000 to May, 2001 (amounting to Rs.23,09,696/-). Since the first period was prior to the Commission's Order dated 5<sup>th</sup> May 2000, for the supplementary bill for that period Pudumjee filed a Writ Petition before the Bombay High Court (No.2567/02). However, it was dismissed in limine by the High Court vide Order dated 9<sup>th</sup> June 2003 (Page 131). As the Writ Petition was dismissed only on technical grounds and there were no conscious findings or adjudication on questions of law or facts, Counsel for Pudumjee submitted that this judgement did not operate as res judicata to estop it.

16. Counsel for Pudumjee drew attention of the Commission to para 5 of page 3 of MSEB's Affidavit in Reply to the High Court, wherein there is a specific averment / disclosure for the first time by MSEB that :



*“...From 21<sup>st</sup> December 1998, through inadvertence the Petitioners were charged demand charges at the rate of Rs.180 per KVA / month instead of Rs.200/ KVA / month. The Respondent No.1 submits that in the month of May 2001, in the course of Government audit it was noticed that the Petitioners were charged demand charges at the rate of Rs.180/KVA/month instead of Rs.200/KVA/month. To rectify the said mistake Respondent No.1 immediately issued a supplementary bill dated 16<sup>th</sup> June 2001 amounting to Rs.60.52 lacs.”*

Counsel for Pudumjee noted that, however, MSEB's 16<sup>th</sup> June 2001 letter does not make any reference to inadvertence on their part. MSEB's letter to Pudumjee only states that -

*"Permission for captive power generation plant at your mill is granted vide order dated 22/9/1998 and as per letter No.1864 dated 21/12/1998 your plant is synchronized with the Board's system in December 1998. As per Board's tariff for HT Consumer, rates for HT consumer is higher who are having CPP synchronized with Board's system under HTP-I. You have been billed at Rs.180 per KVA and Rs.300 per KVA respectively instead of Rs.200 and Rs.320 per KVA from December 1998 to April 2000 and May 2000 to May 2001".*

Counsel submitted that this inadvertence on the part of MSEB is not condonable. If MSEB have acted negligently, then Pudumjee cannot be made to suffer on that account. In their Affidavit in Reply filed before the High Court in February 2003, MSEB have taken the stand that it was inadvertence on their part, and that in the course of audit it was noticed that Pudumjee was charged demand charges at the rate of Rs.180/KVA/month instead of Rs.200/KVA/month. There is no mention of when the audit was done, but it must have been conducted much earlier and was known to MSEB at the relevant time. He pointed out that the 16<sup>th</sup> June 2001 letter was issued by MSEB one full year after the Commission's Order of June 2000, during which period MSEB did nothing, nor did it seek to explain the position to Pudumjee.

17. Counsel for Pudumjee invited attention to Clause 10 (page 47) of the consent issued by MSEB on 22<sup>nd</sup> September 1998 for installation of CPP synchronized with the grid, and quoted one of the conditions as under –

*"In case of the planned shut down of the CPP the excess demand recorded over and above the contract demand will be charged at double the normal demand charge rate of respective tariff in force from time to time. In case of unplanned shut down said demand will be charged at three times the normal demand charge rate of respective HT tariff in force from time to time. The event of planned shut down must be notified atleast three months in advance in writing to the MSEB. A unit can be shut down for annual overhaul only once in a year for a continuous period of one month."*

Counsel submitted that, thus, there were not only two types of CPPs (synchronized and not synchronized). In cases of synchronized CPPs, MSEB also distinguished between planned and unplanned shutdown for the purpose of levying charges.

18. Referring to the HTP-I tariff applicable from 1<sup>st</sup> September 1998 (Page 50), Pudumjee Counsel stated that demand charges were shown as Rs.180/KVA/month of billing demand, and for CPPs synchronized with the grid they were Rs.200/KVA/month. He stated that he wanted to demonstrate why Pudumjee was not charged at Rs.200/KVA/month from that time, and that this was justified. In their Application dated 23<sup>rd</sup> May 2000, MSEB had stated that they were billing the CPP units synchronized with MSEB grid at the rate of Rs.200. The Commission believed in the correctness of that statement, which was not in fact true, and therefore, without issuing notice to the



concerned CPP holders, had accordingly allowed MSEB to add that additional component of Rs.20 to the revised demand charges of Rs.300.

19. Counsel for Pudumjee then referred to MSEB's letter dated 20<sup>th</sup> August 2001, which was in reply to Pudumjee's objection to MSEB's letter of June, 2001, and quoted as under -

*"As regarding charging additional Rs.20 per KVA it is clarified as under:-*

1. *For the period before 1/5/2000 the demand charges are to be charged Rs.200 per KVA as per the provisions in earlier tariff for the consumers having captive power plant synchronized with Board's system.*
2. *W.e.f. 1/5/2000 the demand charges are to be charged @ Rs.320/- per KVA as per the revised tariff order w.e.f. 1/5/2000 circulated vide our Departmental Circular (Commercial) No.646 dated 17/6/2000. This rate was shown in the MERC's order dated 28/4/2000, however, clarification was given by them, subsequently vide its order dated 16/6/2000 and in that it was ordered to charge Rs.320 per KVA for consumers having captive power plant synchronized with Board system. "*

Counsel for Pudumjee submitted that, thus, MSEB had sought to put the onus for the additional Rs.20 charge (Rs. 300 + 20) for synchronized CPPs on the Commission through its Order dated 16<sup>th</sup> June 2000 without mentioning that this was pursuant to MSEB's own Application following the Tariff Order, in which it was stated incorrectly that this was the existing practice, and that it was on the basis that the Commission had mandated it. Moreover, no notice was given to Pudumjee while moving the Commission. It was a basic principle of law that, if a party suffers on account of any action/Order, then it should be heard. He cited rulings of the High Court in cases where Orders were based on non-disclosure of facts. He submitted that this is not a case of bonafide mistake, for which the Court places a rigorous test, i.e. full disclosure to it.

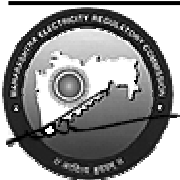
20. Pudumjee Counsel submitted that the compilation of judgements circulated by him includes High Court rulings on the wide scope of review, which is not limited to matters such as errors apparent on the face of the record. Counsel further referred to Regulations 85 & 92 of the Commission's Conduct of Business Regulations, and quoted as under :

**"85. Review of the decisions and directions and orders -**

*Any person aggrieved by directions, decisions or orders of the Commission from which no appeal has been preferred or from which no appeal is allowed and who, from the discovery of new and important matter of evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the directions, decisions or orders were passed on account of some mistake or error apparent on the face of record or for any other sufficient reasons he may apply for review of such order within 45 days of the date of directions or decision or order as the case may be to the Commission. "*

**"92. Saving of inherent power of the Commission –**

- (i) *Nothing in this regulation shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for meeting the aims of justice or to prevent the abuse of the process of the Commission.*
- (ii) *Nothing in the regulation shall bar the Commission from adopting in conformity with the provisions of the Act, a procedure which is at variance*



*with any of the provisions of regulations including summary procedures if the Commission in view of the special circumstance of the matter or class of matters and for reasons to be recorded in writing deems it necessary or expedient for dealing with such a matter or class of matters. Nothing in the regulation shall bar the Commission to deal with any matter or exercise any power under the act for which no regulation have been framed and the Commission may deal with such matter, powers and functions in a manner it thinks fit."*

Counsel for Pudumjee submitted that Regulations 85 and 92 give ample power to the Commission to review its Order of 16<sup>th</sup> June 2000. If it feels that the Order would not have been passed had the Commission been made aware of the correct and full facts, then there is nothing barring the Commission from going into it again. Regulation 81 was also quoted by him as under –

**"81. Interim orders investigation, enquiry, collection of information, etc.-**

*The Commission may pass such interim or ad-interim orders, as the Commission may consider appropriate at any stage of the proceedings having regard to facts and circumstances of the case. The Commission may make such order or orders as it thinks fit for collection of information, inquiry, investigation, entry, search, seizure and, without prejudice to the generality of its powers."*

21. In view of the above Regulations, it was submitted by Counsel for Pudumjee that, if the Commission is convinced of Pudumjee's submission that the 23<sup>rd</sup> May 2000 Application by MSEB does not make true disclosure of facts and, as a result, Pudumjee has suffered to the extent of Rs.60 lacs, then the Commission has the power to direct MSEB to give a true disclosure of facts, especially in the context of the letter dated 16<sup>th</sup> June 2001 and their submissions before the High Court. If the Commission comes to the conclusion that, prima facie, a case is made out by Pudumjee, then it calls for a further inquiry in respect of the auditor's report, and whether this is really a matter arising only out of inadvertence.

22. Summarizing Pudumjee's case, Counsel stated that the September 1998 tariff consisted of two classes of HTP-I consumers, one to be billed at Rs.180 and the other to be billed at Rs.200 (in case of CPPs synchronized with the grid). In addition to these two, there was a 3<sup>rd</sup> category for CPPs synchronized with the grid to be charged at Rs.180 as evidenced by the fact that, after making these provisions, MSEB put Pudumjee into the category of Rs.180 from December 1998 upto May 2000 and charged it accordingly. This is a long period in which many bills were raised by MSEB and also scrutinized by them and, therefore, this had been consciously done inspite of Pudumjee being synchronized with the grid. He submitted that, alternatively, MSEB had obtained the June, 2000 Order for Rs.320 on the basis of misrepresentation and without full disclosure of facts. Counsel for Pudumjee contended that MSEB have taken different stands before the High Court, before the Commission and also before their consumers. If their various stands put a consumer to a loss of Rs.60 lacs, then in all fairness that consumer should be given an adequate opportunity of being heard.

23. Ms. Deepa Chawan, Counsel for MSEB submitted that it was an admitted position that right from 1997 / 1998, i.e. prior to the Commission's first Tariff Order, MSEB were charging this additional component of Rs.20 to HTP consumers with CPPs synchronized with the MSEB grid. After the operative Order dated 28<sup>th</sup> April 2000 and detailed Tariff Order dated 5<sup>th</sup> May 2000, it was realised by MSEB (not with specific reference to Pudumjee, but with general reference to that whole category of consumers) that this component of Rs.20 relating to HTP consumers who had CPPs synchronized with the MSEB grid had not been considered. Hence, MSEB filed their Application of 23<sup>rd</sup> May 2000, seeking clarification. She submitted that the question of MSEB or the Commission giving



notice to each consumer did not arise because all those consumers were already liable to be billed and to pay the additional Rs.20 as per the tariff prevailing from 1997/1998. Counsel for MSEB further submitted that this additional component of Rs.20 was explicitly continued in the Commission's 2<sup>nd</sup> Tariff Order of January 2002 also. That charge predated the constitution of the Commission. Therefore, the question of misrepresentation by MSEB does not arise.

24. MSEB Counsel submitted that, even assuming that there was initially a mistake by some official, that could not mandate a perpetuation of wrong billing. Counsel for MSEB further submitted that when the audit in 2001 detected that MSEB were charging Pudumjee at the rate of Rs.180 without taking into consideration that they are also a CPP holder synchronized with MSEB grid, this levy of Rs.20, which was uniformly chargeable to every such similarly situated consumer, had to be charged to Pudumjee also. Therefore, MSEB issued the supplementary bill dated 16<sup>th</sup> June 2001. Counsel submitted that, as a matter of fact, there was no third category of HTP-I consumers with CPPs synchronized with the grid but who were eligible for payment of demand charges at Rs.180 without the additional component of Rs.20 as claimed by Pudumjee.

25. Counsel further referred to MSEB's Affidavit in Reply to the Writ Petition wherein MSEB had submitted to the High Court that there was an error / lapse on their part which was pointed out by the auditor, and that MSEB had accordingly corrected it. She also referred to the High Court Order dated 9<sup>th</sup> June 2003, and quoted as under -

*"The Petitioners as high tension consumer were granted permission for Captive Power Generation Plant on 22/9/98 and the said plant was synchronized with the Board's system in December 1998. The Petitioners were billed at Rs.180 per KVA from December 1998 to April 2000. As per the existing tariff the Petitioners were required to pay the charges @ Rs.200 per KVA per month. This mistake appears to have been detected in the course of Government audit in the month of May 2001 and accordingly the Petitioners were issued a supplementary bill dated 16/6/2001 amounting to Rs.60.52 Lacs. It is this bill which is under challenge....*

*In the reply affidavit, it has been submitted by the Respondents that the Petitioner requested to the Respondents for payment of supplementary bill in installments, which was granted and the Petitioners did pay the amount except for delayed payment charges and the interest accrued thereon."*

Counsel for MSEB pointed out that this aspect was not brought out by Counsel for Pudumjee before the Commission, and quoted further as follows:

*"On the face of High Tension tariff effective from 1/10/98 it is clear that the consumers having captive power plant synchronized with the Board system is required to pay demand charges @ Rs.200 per KVA per month. Admittedly the Petitioner's captive power plant is synchronized with Board's system and accordingly, were liable to pay demand charges at Rs.200 KVA per month. But instead by mistake the Petitioners were billed at Rs.180 per month. Once the mistake was detected the supplementary bill was issued by the Respondent. Immediately, upon receipt of the supplementary bill the Petitioner did not challenge the same but instead prayed for payment at installments, which seems to have been granted and paid. Mr. Patel, learned Counsel for Petitioners however submitted that there is no justification for demanding charges @ Rs.200 KVA per month for consumers having captive power plant synchronized with Board's system as it does not place any additional burden on Board system."*



26. Counsel for MSEB pointed out that Pudumjee had never challenged the levy of Rs.200 (i.e. the additional component of Rs.20) on CPPs synchronized with the grid. Pudumjee had only said that there was no justification for this levy. She also submitted that Pudumjee's Counsel had wanted to put in a supplementary affidavit to challenge the charges of Rs.180+20 in the 1998 tariff, but the High Court had said that it was too late, and quoted the High Court as follows :

*"He handed in draft amendments seeking to amend the writ petition and to permit the Petitioners to challenge the legality and the constitutionality of 1998 High Tension Tariff to the extent it provided that consumers having captive power plant synchronized with Board system shall pay demand charges at the rate of Rs.200 KVA per month. We took into consideration this aspect and in our considered view it is too late in the day for the Petitioners to raise a grievance that the tariff fixed at the rate of Rs.200 KVA per month for consumers having captive power plant synchronized with the Board system is discriminatory."*

Counsel for MSEB submitted that the High Tension Tariff with the additional Rs.20 component had been effective from 1<sup>st</sup> September 1998, and at no point of time did Pudumjee challenge it. Pudumjee has also not made any submissions on the delay in challenging it in their present Petition, and there is no justification in permitting Pudumjee to do so at this stage.

27. Counsel for MSEB submitted that, although the consumer with a CPP has his own power supply, when he is still connected to MSEB the Board has to incur a fixed expenditure for the purpose. Therefore, from 1998 onwards, MSEB have been levying an additional charge under Section 49 of the Electricity (Supply) Act, and the Commission had agreed with it by its Order dated 16<sup>th</sup> June 2000. Thereafter, that charge had been continued by the Commission in subsequent tariff Orders, after following due public process and scrutiny, upto 1<sup>st</sup> December 2003. In these circumstances, Counsel for MSEB queried as to whether the issue can be reopened or reviewed at this stage. In the third Tariff Order, effective from 1<sup>st</sup> December 2003, the Commission had modified this charge only to apply to the standby component in excess of contract demand. Thereby the Commission had addressed the matter further, as it had said it would in its Order dated 16.6.2000. It cannot be applied retrospectively, nor has Pudumjee asked the Commission to do so.

28. Counsel for MSEB further referred to the Commission's Order (operative part of 2<sup>nd</sup> tariff Order) dated 28<sup>th</sup> December 2001, subsequent to the 16<sup>th</sup> June 2000 Order, which also touched upon the matter of Rs.20 component, and quoted as under –

***"Standby demand charges:***

*HT Industrial consumers having captive generation facilities synchronized with the grid, will pay additional demand charges of Rs.20 per KVA per month. "*

Counsel also referred to Clause 50 at Page 101 of the Order dated 1<sup>st</sup> December 2003 whereby the Commission has modified this levy of Rs.20 and quoted as under:

*"The additional standby charges of Rs.20 per KVA per month will be applicable to HT industrial consumers with captive generating units synchronized with the MSEB grid, only on the extent of standby demand, and not the entire contract demand as prevalent currently."*

Counsel for MSEB explained that the very fact that the Commission has used the term "prevalent currently" means that it had taken note of the fact that MSEB were charging Rs. 20/KVA/month throughout the period prior to this Order. She submitted that when a tariff is decided by the Commission, it becomes effective from that date and it remains so until the next tariff



is decided. Therefore, she submitted that there was no misrepresentation by MSEB as alleged by Pudumjee, and contended that this kind of Petition amounts to an abuse of the process of law.

29. Counsel for MSEB further argued that Pudumjee's Application seeks to go back to the Order dated 16<sup>th</sup> June 2000 without even a mention of condonation of delay. With regard to the plea that the Commission exercise its inherent powers, Pudumjee was well aware in August 2001 itself that there was a clarificatory Order passed by the Commission. There is no explanation given in the Petition as to why Pudumjee has chosen to come before the Commission in October 2004 with a grievance relating to alleged misrepresentation by MSEB in the year 2000.

30. Counsel for MSEB also referred to paras 31, 32 and 36 of the Commission's last Order dated 22<sup>nd</sup> July 2004 relating to Pudumjee in Case No.30 of 2001, whereby liberty was given to Pudumjee to reapply to the Commission, and quoted as under:

*"31. Counsel for MSEB submitted that the High Court, while dismissing Pudumjee's Petition, had referred to why the levy is being charged. It is not merely for utilisation, but a fixed cost that MSEB incur for maintenance and capital cost. She stated that she would circulate MSEB's reply pertaining to the Writ Petition and the Orders with MSEB's affidavit for a clear picture. Counsel for Pudumjee submitted that after examining MSEB's reply, he would file a rejoinder.*

*32. Counsel for MSEB sought guidance from the Commission as to whether MSEB should wait for High Court order in MSEB's appeal (that is the appeal to challenge tariff order) since it is yet to be pronounced, or file a reply, since it was on that account that the present case has been in abeyance. However, that appeal concerned several other matters. The Commission clarified that in this particular case, since the Commission had passed another order in January 2002 dealing with the levy of Rs.20 per KVA, it had thought that it would hear Pudumjee briefly, and Pudumjee may consider withdrawing the Petition in view of the deliberations. Counsel for Pudumjee submitted that they were uncertain about the concept of standby demand charges and, since the concept of standby demand charges had been clarified by 1<sup>st</sup> December 2003 order, he would take instructions and file an affidavit before the Commission after examining the financial impact."*

She submitted that it was only on this basis that the Commission granted liberty to Pudumjee to approach it again.

*"36. In view of the foregoing, the Commission declines to admit the Petition. However, Pudumjee are at liberty to reapply with further grounds for admission in terms of the Regulations governing review in case they are able to do so subsequently, keeping in view the position set out in paras 31 & 32 above."*

Thus, in the above case, it was urged by Pudumjee that, having been uncertain about the concept of standby demand charges and since the concept of standby demand charges had been clarified by the 1<sup>st</sup> December 2003 Order, a fresh affidavit would be filed before the Commission after examining the financial impact, and the Commission had declined to admit the Petition with liberty to reapply with further grounds for admission. But now what is urged by Pudumjee before the Commission is something totally different and contrary to what was urged last time. MSEB Counsel submitted that, therefore, the Petition should be dismissed with costs.



31. Counsel for Pudumjee responded that its case is specifically related to MSEB's Application dated 23<sup>rd</sup> May 2000 and the Commission's Order dated 16<sup>th</sup> June 2000. The concept of standby charges is not mentioned in the tariff Order dated 5<sup>th</sup> May 2000. He further submitted that the concept of standby charges explained by the Commission in the latest tariff Order is conceptually quite different from the additional Rs.20 component in the 1998 and subsequent tariffs. Secondly, he submitted that since MSEB, in their tariff revision proposal for the relevant year, i.e. 2000-2001, were silent about the additional Rs.20, there was no occasion for consumers to say anything about it during the tariff proceedings. He referred to the latest Tariff Order for FY 2003-04 and quoted para 2.2.3 as under -

**"Para 2.2.3 Commission's Ruling –**

*The Commission has already elaborated the rationale for levy of demand charges in its previous Tariff Orders. A major part of the costs of the MSEB, apart from cost of fuel for own generation and variable cost of power purchase, is fixed in nature and the ratio of fixed to variable costs currently stands at 53:47. Though the consumer accesses electricity at any time he desires, the MSEB's infrastructure (physical infrastructure as well as employees, administration, etc.) has to be permanently available, and related costs incurred irrespective of the level of consumption by individual consumers, and these expenses thus comprises the fixed costs of MSEB.*

*The Commission has continued the process of increasing the recovery of fixed costs by levy of fixed charges to consumers, to safeguard the MSEB from steep fluctuations in revenue with varying consumption over time. The revised fixed/ demand charges have been designed to recover around 40% of MSEB's fixed costs, as compared to the existing level of recovery of around 35% of fixed costs. The balanced fixed costs are recovered through energy charges. Thus, for any disruption in supply, the MSEB is effectively losing out on the recovery of fixed costs to that extent. If MSEB is not allowed to recover fixed cost for the period of interruptions and low voltage period, it would further affect the financial viability of MSEB. At the same time, the Commission does not intend that the consumers should suffer for the poor quality of supply from MSEB, and hereby directs the MSEB to take all possible measures to maintain the voltages within the prescribed limits, and to limit the load shedding hours to the minimum."*

*"The Commission has considered the representations of several industrial consumers in the context of charges applicable for standby facility extended to the consumers by the MSEB. The Commission hereby orders that the additional Standby charges of Rs.20 per KVA per month will be applicable to HT industrial consumers with captive generating units synchronized with MSEB grid, only on the extent of standby demand, and not the entire contract demand as prevalent currently. Moreover, the Commission accepts the rationale put forth by Pudumjee Pulp, that the standby charges should be levied only if there is actual standby facility being extended by the MSEB. There is no merit in the MSEB's practice of levying additional demand charges of Rs.20 per KVA per month on the entire billing demand despite the fact that the billing demand has never exceeded the contract demand. In such cases the MSEB is not really offering any standby facility, and is only supplying within the consumer's contract demand. Hence, standby charges will be levied on such consumers on the standby component, only if the consumer's demand exceeds the contracted demand."*

32. Counsel for Pudumjee noted that the Commission had specifically mentioned Pudumjee in the above Tariff Order. Further, the Commission itself had finally rejected the practice of MSEB levying of the component of Rs.20 on the entire billing demand, and introduced a new concept of standby charge. The Writ Petition filed by Pudumjee in the High Court was dismissed on technical grounds. The High Court had also stated only that it was too late for Pudumjee to amend its Petition to



challenge the 1998 tariff. Therefore, Counsel submitted that the High Court Order does not prevent Pudumjee's present claim. Further, Regulations 85 and 92 allow reopening of the matter, and the Commission's Order dated 22<sup>nd</sup> July 2004 itself grant permission to Pudumjee to reapply with further grounds for admission. Accordingly, Pudumjee has approached the Commission again within 45 days of that Order. To the Commission's observation that the dispensation in the last tariff Order is prospective, Counsel submitted that his case is that there is no connection between the concept of standby charge introduced in the latest tariff Order, and the additional Rs.20 component billed prior to that to Pudumjee by MSEB, after it had been charged without this additional component till mid 2001.

33. Subsequent to circulation of the Record of the hearing, Pudumjee made a further written submission, essentially reiterating its contentions in brief and challenging MSEB Counsel's various statements made during the hearing as incorrect.

34. The Commission notes that, in its Order dated 22<sup>nd</sup> July, 2004 on Pudumjee's earlier Petition (Case No. 30 of 2001), it had stated (at paras 35 and 36) that:

*"The Commission notes that both the issues of which review is sought, viz. withdrawal of the additional charge of Rs 20/- per KVA and the reliability charge, are substantive elements of the impugned tariff and related Orders, and have been further amplified in the Commission's latest tariff Order. These Orders have been passed after following due process and consideration, and public hearings where required. Keeping in view the deliberations at the hearing held on 12<sup>th</sup> January, 2004 and the observations made, the Commission finds that the present Petition does not meet the test of the provisions in the Regulations governing review, either in terms of any prima facie error apparent on the face of record or any other mistake, or new facts, or any other sufficient reason. Under the Regulations, the ambit of review is circumscribed, and the Commission cannot entertain what is essentially an appeal against its Orders in the guise of such review. That would amount to ascribing to itself the powers of the competent appellate authority under the law. Moreover, the Commission has waited for considerable time for a further filing by Pudumjee, which has not been forthcoming upto now.*

*In view of the foregoing, the Commission declines to admit the Petition. However, Pudumjee are at liberty to reapply with further grounds for admission in terms of the Regulations governing review in case they are able to do so subsequently, keeping in view the position set out at paras 31 and 32 above."*

Thereafter, Pudumjee have filed the present Petition with the prayers set out in the 1st para of this Order. These prayers essentially require a review of the Commission's Order dated 16<sup>th</sup> June, 2000 and related matters. It is, therefore, worthwhile setting out again the provisions of Regulations 85 of the MERC (Conduct of Business) Regulations, 2004 (which is similar to Regulation 87 of the earlier Regulations of 1999):

**"85. Review of decisions, directions and orders-**

- (a) Any person aggrieved by a direction, decision or order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the



*time when the direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may apply for a review of such order, within forty-five days of the date of the direction, decision or order, as the case may be, to the Commission...*

- ... (d) *When it appears to the Commission that there is no sufficient ground for review, the Commission shall reject such review application.*
- (e) *When the Commission is of the opinion that the review application should be granted, it shall grant the same provided that no such application will be granted without previous notice to the opposite side or party to enable him to appear and to be heard in support of the decision or order, the review of which is applied for."*

35. The main ground for review sought by Pudumjee is that the Commission's Order dated 16<sup>th</sup> June, 2000 was based on an Application from MSEB subsequent to the 1st tariff Order. That Application stated, inter alia, that there was a pre-existing and ongoing dispensation to the effect that HT consumers with Captive Power Plants (CPP) synchronized with the grid were liable to pay an additional amount of Rs 20/- per KVA/month over and above the demand charges (earlier Rs 180/-) for other HT consumers. Pudumjee's contention is that MSEB had misrepresented the facts to the Commission inasmuch as Pudumjee was being billed ever since the tariff revision in 1998 at Rs 180/- and that, thus, there was in effect a third category of HT consumers, viz. those with CPPs synchronized with the grid who were liable to pay demand charges without the additional Rs 20/-. Thus, the Commission's Order was based on misrepresentation of the facts by MSEB, which would have been pointed out by Pudumjee had it been noticed and given an opportunity to be heard. Once this position is accepted, Pudumjee has put forward various other contentions regarding the merits or otherwise of that additional component and the logic of making such a distinction between HT consumers..

36. It is a matter of record, and Pudumjee has itself quoted in its Petition (as mentioned at para 2 above), that in MSEB's HT tariff effective from 1st September, 1998, as against demand charges of Rs 180/- per month/ per kVA of billing demand, consumers with CPPs synchronized with the MSEB system are to pay demand charges @ Rs 200/- per month/ per KVA/month, i.e. paying an additional amount of Rs 20/-. Pudumjee has at no stage shown from the 1998 tariff or any other document that, apart from this, there was another category of such CPP holders who were liable to pay demand charges without this additionality, relying instead on the factual circumstance that, till June, 2001, it was not asked to pay it as indicating the existence of such a third category. MSEB have fairly admitted an error on their part, both in the High Court and before the Commission, in wrongly charging Pudumjee without this component although its CPP was synchronized with the grid. The fact of such erroneous billing cannot possibly be treated as tantamount to the existence of any other tariff category which has not been duly mandated, though it reflects poorly on the diligence that MSEB should have exercised, particularly since the mistake was not rectified till one year after the Commission's Order dated 16<sup>th</sup> June, 2000. Pudumjee's other averment regarding the distinction made by MSEB in cases of planned and unplanned shut down while charging for exceeding contract demand (cited at para 14 above) is unrelated to the additional component of Rs 20/-. Thus, the Commission finds no misrepresentation on this account by MSEB when they applied in May, 2000 after the tariff Order citing the general dispensation in this regard. As a result, the question of review of that and related Orders does not arise considering the provisions of the Regulations.

37. As far as the challenge to the additional component itself is concerned, it therefore becomes a subject matter for appeal, which is beyond the Commission's jurisdiction. The Commission notes, however, that Pudumjee had sought to reopen the 1998 tariff on this count before the High Court, but



was denied. While retaining the additional Rs 20/- component in its 2nd tariff Order, the Commission had subsequently altered its basis in its last tariff Order effective from December 2003, but this is not relevant to the immediate issue before us. However, it may be mentioned that, during the course of the earlier proceedings, the Commission had also briefly set out the rationale for this charge.

38. In any case, considering the above, the question of the Commission requiring to exercise its powers under Regulation 92 also does not arise. Before concluding the matter, it may only be mentioned that, at para 8 of the Petition, Pudumjee has also stated that:

*"It is also a fact borne from the record that Applicant have not run CPP through relevant period in synchronization with MSEB grid and non Applicant did not ascertain this fact at any point of time."*

This point was not elaborated by Pudumjee further and, indeed, it has nothing to do with the main arguments for review or for doing away with the charge, but relates to the implementation of the tariff as applied from time to time, and may be dealt with by the parties separately..

The Commission disposes of Pudumjee's Petition accordingly.

Sd/-  
(Shri A. Velayutham)  
Member

Sd/-  
(Dr. Pramod Deo)  
Member



(A.M. Khan),  
Secretary, MERC

